

1 **TIMOTHY J. HAGERTY**
2 Admitted *pro hac vice*
3 Frost Brown Todd LLC
400 W. Market St., 32nd Floor
3 Louisville, Kentucky 40202
Telephone: (502) 589-5400
4 Facsimile: (502) 581-1087
Email: thagerty@fbtlaw.com
5

6 **KENNETH A. REICH**
7 Admitted *pro hac vice*
WolfBlock LLP
One Boston Place
Boston, MA 02108
8 Telephone: (617) 226-4003
Facsimile: (617) 226-4500
9 Email: kreich@wolfblock.com

10 **JOSE R. ALLEN**
11 Skadden, Arps, Slate, Meagher & Flom LLP
Four Embarcadero Center, Suite 3800
San Francisco, CA 94111
12 Telephone: (415) 984-6400
Facsimile: (415) 984-2698
13 Email: Jose.Allen@skadden.com

14 Attorneys for Applicant Intervenor-Defendant
East Kentucky Power Cooperative, Inc.
15

16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

20 CENTER FOR BIOLOGICAL DIVERSITY,
21 KENTUCKY ENVIRONMENTAL
22 FOUNDATION, and SIERRA CLUB

Case No. C08-1240-MMC

23 Plaintiffs,
vs.
24 RURAL UTILITIES SERVICE, a federal agency
Within the United States Department of Agriculture
25 Defendant.

**EAST KENTUCKY POWER
COOPERATIVE, INC.'S REPLY TO
PLAINTIFFS' RESPONSE TO MOTION
TO INTERVENE**

Date: June 27, 2008
Time: 9:00 a.m.
Honorable Maxine M. Chesney
Courtroom 7, 19th Floor

1 Applicant Intervenor-Defendant East Kentucky Power Cooperative, Inc. ("EKPC") by and
2 through its undersigned counsel, files this Reply in response to Plaintiffs Center for Biological
3 Diversity, Kentucky Environmental Foundation, and Sierra Club's (collectively, "Plaintiffs")
4 Response to Motion to Intervene. As discussed at length in its memorandum of points and
5 authorities in support of its motion to intervene and herein, EKPC has a significantly protectable
6 interest that may as a practical matter be impaired or impeded by the disposition of this action. The
7 interest of EKPC is different from, and cannot be adequately represented by, Defendant Rural
8 Utilities Service ("RUS"). In addition, there are common questions of law and fact between the
9 claims and defenses of EKPC and the main action, and EKPC's participation will contribute to the
10 equitable resolution of the case. Plaintiffs' opposition papers do not raise any compelling counter
11 arguments. Thus, EKPC is entitled to intervene as of right or in the alternative permissively under
12 Rule 24.

ARGUMENT

I. Plaintiffs present no argument that precludes EKPC from being granted leave to intervene as a matter of right pursuant to Rule 24(a).

16 While EKPC has acknowledged that the Ninth Circuit typically limits the scope of
17 intervention as a matter of right for private parties in NEPA actions to the remedy phase of the
18 case, *see Kootenai Tribe of Idaho*, 313 F.3d 1094, 1108 (9th Cir. 2002),¹ Ninth Circuit precedent
19 establishes EKPC should be allowed to intervene fully as a matter of discretion under Rule 24(b).
20 *See, e.g., Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002); *Center for*
21 *Biological Diversity v. U.S. Fish & Wildlife Service*, 2005 U.S. Dist. LEXIS 42275, at *18-19
22 (N.D. Cal. 2005); *Defenders of Wildlife v. Johanns*, 3005 U.S. Dist. LEXIS 34455, at *28 (N.D.
23 Cal. 2005). It is necessary briefly to respond to Plaintiffs' misstatements of fact and law regarding

²⁵ ¹ In light of the facts here EKPC respectfully requests the Court to exercise its discretion
²⁶ to make an exception to the *general* rule. The reasonableness of such an exception certainly is seen
²⁷ in the number of other Circuits where the regular practice is to allow project proponents and others
²⁸ to intervene in NEPA cases. *See, e.g., Kleissler v. U.S. Forest Service*, 157 F.3d 964, 971 (3d Cir.
1998); *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994); *Wilderness Soc'y v. Babbitt*, 104 F.
Supp. 2d 10, 18 (D.D.C. 2000). *But see Wade v. Goldschmidt*, 673 F.2d 182, 184-85 (7th Cir.
1982).

1 EKPC's significantly protectable interest in this action and the inadequacy of representation by the
2 Government.

Plaintiffs contend that the Court should disavow well-established Ninth Circuit precedent and deny even limited intervention of right to EKPC based on the argument that EKPC does not have even a "significantly protectable" interest in the remedies phase of this NEPA case. Plaintiffs' Response to Motion to Intervene ("Plaintiffs' Brief" or "P.B.") at 5-7. To the contrary, EKPC has the most direct interest in this case of any one -- because it is the entity seeking financing from RUS for its energy projects, financing that would be directly impacted if Plaintiffs prevail.²

9 There can be no question that EKPC has a "significantly protectable interest" in this
10 litigation. RUS financing of cooperative energy projects is the cornerstone and bedrock of RUS's
11 coop program. Indeed, in RUS's memorandum in support of its motion to transfer venue, it
12 explained that the Rural Electrification Act of 1936, ch. 432, 49 Stat. 1363 (May 20, 1936) ("RE
13 Act"), authorizes the Secretary of Agriculture to make loans for the purpose of ""furnishing and
14 improving electric . . . service in rural areas," and for the purpose of assisting electric borrowers to
15 implement demand side management, energy conservation programs, and renewable energy
16 systems. [RUS] . . . was established in 1994 to carry out the electric program under the RE Act."
17 Government's Notice of Motion and Motion to Transfer Venue and Memorandum in Support at 1.
18 Without such financing from RUS, EKPC's ability to provide much needed energy to its customers
19 will be greatly jeopardized. This is more than a mere "economic interest" because of EKPC's duty
20 to provide needed power to its customers, as that need was determined and ordered, following an
21 extensive hearing by the Kentucky Public Service Commission ("PSC").

Plaintiffs also argue that since EKPC does not have a legal right to receive money from RUS it has no protectable interest. EKPC, of course, is an applicant for such funding and fully

² In a similar NEPA case against RUS, *Montana Environmental Information Center, et al. v. Johanns, et al.*, 1:07-cv-01311-JR (D.D.C.), the project proponent moved for full intervention as of right and permissively; Sierra Club, one of the plaintiffs in this action, did not oppose the motion and it was granted. It is disingenuous for Sierra Club and its co-plaintiffs to contend in a similar NEPA case against RUS that another project proponent seeking financing from RUS does not have a "significantly protectable" interest, even for purposes of limited intervention in the remedy phase.

1 expects it will receive the money it needs to provide much needed electricity to its customers. As
 2 stated above, one of the very purposes of RUS is to ensure that such funding is available to electric
 3 coops such as EKPC. Although Plaintiffs argue that EKPC does not have a protectable interest,
 4 they routinely seek to intervene in cases where they have less of a tangible interest than EKPC.
 5 See, e.g., *Center for Biological Diversity*, 2005 U.S. Dist. LEXIS 42275. Both types of
 6 documented interests justify intervention in these types of cases.

7 Plaintiffs argue incorrectly that EKPC does not need the combustion turbines ("CTs") and
 8 the power line and thus this action will not likely impact EKPC. P.B. at 6-7. However, the orders
 9 of the Kentucky Public Service Commission attached to the Marshall Declaration as Exhibits A-C
 10 granting certificates of public convenience and necessity to EKPC and the unrebutted Declaration
 11 of Robert M. Marshall demonstrate EKPC's need for the CTs and the transmission line which are
 12 the subject of the RUS action which is challenged here. The Declaration of Robert M. Marshall
 13 states: "[t]he proposed transmission line and switching stations are needed to provide an outlet for
 14 the additional electric power that will be generated at the Smith Station. . . ." Marshall Dec., ¶ 7,
 15 filed concurrently with EKPC's motion to intervene. The Kentucky Public Service Commission
 16 found the statutory need for these independent projects. Marshall Dec., Exhibit A-C³. Thus,
 17 Plaintiffs' allegations are unsupported.

18 Plaintiffs' argument that EKPC should not be granted the right to intervene because the
 19 government will adequately represent it in this action is similarly flawed. An applicant intervenor
 20 must demonstrate that the party on whose side it wishes to intervene is not capable or willing to

21

22 ³ In *An Investigation into East Kentucky Power Cooperative, Inc.'s Continued Need for*
Certificated Generation, PSC Case No. 2006-00564, on May 11, 2007, the PSC stated that "[t]he
 23 scope of this proceeding will be limited to EKPC's continued need for the certificated generation.
 The Commission has previously found the certificated projects to be the most reasonable and
 24 lowest-cost options for provisioning EKPC's distribution cooperatives with the power they require
 both now and in the future." Attachment 2 to the Marshall Dec. Then, on September 19, 2007, the
 25 PSC stated in *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public*
Convenience and Necessity for the Construction of a 345 KV Electric Transmission Project in
 26 *Clark, Madison and Garrard Counties, Kentucky*, PSC No. 2006-00463, that "EKPC has presented
 substantial evidence that the construction of additional generation facilities at its Smith Station will
 27 require the construction of the proposed transmission main. Liberty examined whether EKPC had
 given adequate consideration of wheeling power through another utility's system and determined
 that EKPC had given adequate consideration to that alternative and had reasonably rejected it in
 favor of constructing the proposed line." Attachment 3 to the Marshall Dec.

1 make the applicant intervenor's arguments. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d
 2 1392, 1397 (9th Cir. 1995); *see also Sierra Nevada Forest Protection Campaign v. U.S. Forest*
 3 *Service*, 2006 U.S. Dist. LEXIS 29919 (E.D. Cal. 2006) (because federal government did not have
 4 "the same type of vested economic interest" in litigation as applicant intervenor, court found
 5 applicant intervenor showed "sufficient doubt about the adequacy of representation"). "The burden
 6 of making this showing is *minimal.*" *Pacific Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016,
 7 1025 (N.D. Cal. 2002) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983))
 8 (emphasis added). As discussed in EKPC's moving papers, EKPC and RUS have different goals
 9 and objectives. RUS is concerned with the integrity of its financing program and regulations,
 10 whereas EKPC is concerned with and is statutorily required to address the electrical power needs
 11 of its customers. Consequently, RUS and EKPC have different interests and RUS may not be
 12 capable of making or willing to make the arguments EKPC will make in this matter.

13 Plaintiffs cite to a Ninth Circuit case for the proposition that "a presumption of adequate
 14 representation generally arises when the representative is a government body or officer charged by
 15 law with representing the interests of the absentee." P.B. at 7 (quoting *Forest Conservation*
 16 *Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 (9th Cir. 1995) ("FCC")). That case actually
 17 supports EKPC's position here, not Plaintiffs: The Ninth Circuit reversed and remanded an earlier
 18 denial for intervention because, among other reasons, the government agency there, the Forest
 19 Service, was not charged with representing the interests of the applicant intervenors, but instead
 20 with its own laws. *See FCC*, 66 F.3d at 1499. The court cited another oft-cited and instructive
 21 NEPA case, *Sierra Club v. Espy*, 18 F.3d at 1208, for the proposition that in that case, the
 22 government was an inadequate representative of applicant intervenors when the applicant
 23 intervenor is intervening to protect its economic interests and the government is representing "the
 24 broad public interest." *Id.* (citing *Sierra Club v. Espy*, 18 F.3d at 1208). Likewise, here, RUS

25

26

27

28

1 must protect the "broad public interest" and must protect the integrity of its own regulations -- it is
 2 *not* charged with representing the interests of EKPC.⁴

3 **II. EKPC meets the test to intervene permissively as a matter of judicial discretion under**
 4 **Rule 24(b)(1)(B).**

5 In its opening papers, EKPC requested as an alternative to Rule 24(a) intervention,
 6 permissive intervention under Rule 24(b). Plaintiffs contend that EKPC should not be permitted
 7 such intervention based on allegations that EKPC has not "demonstrated that it will 'supplement the
 8 position already taken by the other parties.'" P.B. at 8. Such a statement disavows well-settled
 9 Ninth Circuit law explained in such NEPA cases as *Kootenai Tribe v. Idaho*, 313 F.3d 1094 (9th
 10 Cir. 2002) and *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 2005 U.S. Dist.
 11 LEXIS 42275 (N.D. Cal. 2005). These cases recognize that if there are common questions of law
 12 or fact between the original action and the issues raised by the applicant intervenor, permissive
 13 intervention is appropriate. Indeed, in those cases the underlying NEPA claim in the original
 14 action was found to have common questions of law or fact in how the land would be utilized. *See,*
 15 *e.g.*, *Center for Biological Diversity*, at *17-18.

16 Additionally, the *Kootenai Tribe* court provided helpful instruction when it recognized that
 17 the applicant intervenors' participation "would assist the court in its orderly procedures leading to
 18 the resolution of th[e] case . . ." 313 F.3d at 1111. Certainly, here, the active participation of the
 19 project proponent, EKPC -- the entity that will be most directly affected by the actions of the Court
 20 in this case -- will assist the Court in its orderly procedures leading to the resolution of this case.
 21 EKPC's knowledge of the underlying project and access to documents will assist the Court in
 22 seeking a just resolution of this matter; and in the event the Court needs additional information
 23 pertaining to this project, EKPC as a party will be in a position to supplement the record.

24 Disingenuously, Plaintiffs seek to apply a different rule for permissive intervention by
 25 EKPC, whose ox would be gored by the relief requested by plaintiffs, than they typically seek for
 26

27 ⁴ See also discussion above regarding Sierra Club's lack of opposition to the motion for
 28 intervention of right in *Montana Environmental Information Center, et al. v. Johanns, et al.*, 1:07-
 cv-01311-JR.

1 themselves in cases where their interest is much less tangible. *See, e.g., Center for Biological*
 2 *Diversity*, 2005 U.S. Dist. LEXIS 42275 (Center for Biological Diversity sought full intervention).
 3 The Court should not countenance this blatantly self-serving argument. Grant of full intervention
 4 will result in a full exploration of the factual record, which is in the spirit of the Federal Rules of
 5 Civil Procedure.

6 Plaintiffs also argue that if granted the right to intervene, EKPC may protract this litigation.
 7 P.B. at 9. That is pure speculation and is not supported by any cited Ninth Circuit caselaw. Instead
 8 plaintiffs cite to an inapposite case from the Southern District of New York, *British Airways Bd. v.*
 9 *Port Auth.*, 71 F.R.D. 583 (S.D.N.Y. 1976). That case was not a NEPA challenge, but instead
 10 involved declaratory and injunctive relief sought by plaintiff airlines who believed the Port
 11 Authority of New York was unfairly precluding the Concorde jet from taking off from JFK
 12 Airport. The applicant intervenors were municipalities who were concerned about noise. There is
 13 no basis to suggest that EKPC will delay the proceedings in this case; instead, the facts indicate just
 14 the opposite. EKPC stipulated with the other parties to a shortened briefing time for the Reply in
 15 order to accommodate the previously scheduled June 27 hearing date. EKPC will readily stipulate
 16 to filing all briefs on the same schedule as the government and will cooperate fully to expedite
 17 resolution of this case.

18 **III. Plaintiffs' Argument to Limit the Scope of Intervention is Inappropriate.**

19 In a final argument to prevent the Court from having the assistance of EKPC -- the entity
 20 that would be most directly affected by the Court's actions -- in ensuring a just resolution of this
 21 matter, Plaintiffs urge the Court to limit the scope of EKPC's intervention. While EKPC
 22 recognizes the general rule in this Circuit that project proponents may as *of right* participate in the
 23 remedy phase of the matter only, plaintiffs cite no authority for similarly limiting the scope of
 24 permissive intervention. Indeed, Plaintiffs are unable to point to any caselaw that suggests
 25 anything other than courts *may* limit the scope of intervention when granting permissive
 26 intervention. Even though they would have EKPC intervene only on a limited basis here, one of
 27 the plaintiffs, Center for Biological Diversity, sought and was essentially granted full intervention
 28 in *Center for Biological Diversity*, 2005 U.S. Dist. LEXIS 42275 (N.D. Cal. May 30, 2005). *See*

1 also *Kootenai Tribe of Idaho*, 313 F.3d at 1108-1111 (environmental group intervenors sought full
 2 intervention). Intervenors under Rule 24(b) regularly are granted intervention status without the
 3 limits urged by Plaintiffs here. See, e.g., *Kootenai Tribe of Idaho*, 313 F.3d at 1108-1111;
 4 *Defenders of Wildlife v. Johanns*, 2005 U.S. Dist. LEXIS 34455, at *28 (N.D. Cal. 2005); *Center*
 5 *for Biological Diversity*, 2005 U.S. Dist. LEXIS 42275 (N.D. Cal. 2005). The interests of EKPC in
 6 this action are so substantial that permissive intervention should be granted without limiting the
 7 scope of the intervention.

8 Plaintiffs' alternative suggestion that EKPC's participation as *amicus curiae* would fully
 9 protect its interests should also be rejected. It is ironic that Plaintiffs would suggest that EKPC --
 10 which has a very significant interest in the outcome of this matter -- would have its rights
 11 adequately protected by filing an *amicus* brief, while Plaintiffs apparently believe that filing an
 12 *amicus* is insufficient for themselves in other NEPA cases. See, e.g., *Center for Biological*
 13 *Diversity*, 2005 U.S. Dist. LEXIS 42275 (N.D. Cal. May 30, 2005). By participating fully as a
 14 party, EKPC will be able to take part in all proceedings and will be able to play a significant role in
 15 ensuring the completeness of the record. This will not be possible if EKPC is relegated to the role
 16 of an *amicus*.

17 CONCLUSION

18 Accordingly, for the reasons set forth in its Motion and this Reply, East Kentucky Power
 19 Cooperative, Inc. respectfully requests that the Court grant its motion to intervene pursuant to
 20 Federal Rule of Civil Procedure 24.

21 DATED: June 17, 2008

22 Respectfully submitted,

23 /s/ José R. Allen
 24 JOSE R. ALLEN
 Skadden, Arps, Slate, Meagher & Flom LLP
 25 Four Embarcadero Center, Suite 3800
 San Francisco, California 94111
 Telephone: (415) 984-6400
 26 Facsimile: (415) 984-2698
 Email: Jose.Allen@skadden.com

1 TIMOTHY J. HAGERTY
2 Frost Brown Todd LLC
3 400 W. Market St., 32nd Floor
4 Louisville, Kentucky 40202
5 Telephone: (502) 589-5400
6 Facsimile: (502) 581-1087
7 Email: thagerty@fbtlaw.com

8
9
10 KENNETH A. REICH
11 WolfBlock LLP
12 One Boston Place
13 Boston, MA 02108
14 Telephone: (617) 226-4003
15 Facsimile: (617) 226-4500
16 Email: kreich@wolfblock.com

17
18 Attorneys for Applicant Intervenor-Defendant
19 East Kentucky Power Cooperative, Inc.

20
21
22
23
24
25
26
27
28